Zainudin bin Muhammad v NEC System Intergration Construction Ltd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-23-73 OF 1999
KAMALANATHAN RATNAM J
2 JUNE 2000

***Tort** — Defamation — Libellous letter — Defamatory meaning — Whether words 'We expect that as a respectable businessman, your promise of "trust me, I will pay" will be kept' were defamatory*

***Tort** — Defamation — Publication — Alleged defamatory statement made to plaintiff only — Whether constitutes publication*

The plaintiff had entered into a settlement agreement with two investors to return certain sums of money which they had invested with him. Pursuant to the agreement, the plaintiff was directed to pay a sum of USD7.5m into a bank account belonging to the first defendant by 19 February 1999. The second and third defendants, acting as attorneys for the first defendant wrote to the plaintiff a letter dated 29 January 1999. The plaintiff contended that the first line of the last paragraph of the letter which reads, 'We expect that as a respectable businessman, your promise of "trust me, I will pay" will be kept' was defamatory. However, the senior assistant registrar ('the SAR') who heard the case found against the plaintiff. The plaintiff appealed.

Held, upholding the SAR's decision and dismissing the appeal:

(1) In his statement of claim, the plaintiff had only stated that the second and third defendants as servants or agents of the first defendant wrote and published or caused to be published the letter dated 29 January 1999. However, the plaintiff had made no reference in the statement of claim as to who else the publication was made to. In order to constitute publication, the allegedly defamatory matters must be published to, or communicated to, a third party other than to the plaintiff himself (see p 767C); *Sheffil v Van Densen* (1859) 79 Mass R 304 followed. The plaintiff also could produce no evidence to substantiate his contention that the letter had been sent by fax; on the contrary there was clear evidence that the said letter was dispatched by express delivery to the plaintiff personally (see p 767E).

(2) Nothing defamatory can be found about the the first line of the last paragraph of the letter dated 29 January 1999. The plaintiff was unable to illustrate with any single authority to suggest that the said words had a defamatory meaning and did not even address the court as to how such words could be termed defamatory. Furthermore, the second and third defendants had a legal duty to write the letter to the plaintiff and in the absence of

express malice, ex facie the letter cannot in any way be defamatory to the plaintiff. The entire final paragraph read together was a plea to the plaintiff to abide by his commitment and a subtle warning to the plaintiff to pay up or else face litigation (see pp 767F–G, I, 768C).

[Bahasa Malaysia summary

Plaintif telah memasuki satu perjanjian penyelesaian dengan dua pelabur bagi mengembalikan sejumlah wang yang mereka telah melabur dengan beliau. Menurut perjanjian tersebut, plaintif diarahkan membayar sejumlah USD7.5 juta ke dalam akaun bank milik defendan pertama sebelum 19 Februari 1999. Defendan-defendan kedua dan ketiga, yang bertindak sebagai peguam defendan pertama telah menulis kepada plaintif sepucuk surat bertarikh 29 Januari 1999. Plaintif menegaskan bahawa baris pertama kepada perenggan terakhir surat tersebut yang berbunyi 'We expect that as a respectable businessman, your promise of "trust me, I will pay" will be kept' adalah berunsur fitnah. Namun begitu, penolong kanan pendaftar ('PKP') yang mendengar kes tersebut tidak memihak kepada plaintif. Plaintif telah membuat rayuan.

Diputuskan, membenarkan keputusan PKP dan menolak rayuan tersebut:

(1) Di dalam pernyataan tuntutan beliau, plaintif hanya menyatakan bahawa defendan-defendan kedua dan ketiga sebagai kakitangan atau ejen defendan pertama telah menulis dan menerbitkan atau menyebabkan surat bertarikh 29 Januari 1999 diterbitkan. Namun begitu, plaintif tidak membuat apa-apa rujukan kepada pernyataan tuntutan tersebut tentang siapa lagi penerbitan surat tersebut ditujukan. Untuk membentuk satu penerbitan, perkara-perkara yang didakwa memfitnah mesti diterbitkan kepada, atau disampaikan kepada, satu pihak ketiga selain daripada plaintif seorang (lihat ms 767C); *Sheffil v Van Densen* (1859) 79 Mass R 304 diikut. Plaintif juga tidak dapat mengemukakan apa-apa keterangan untuk mengukuhkan penegasan beliau bahawa surat tersebut telah dihantar melalui faks; sebaliknya terdapat keterangan yang jelas bahawa surat tersebut telah dihantar melalui hantaran secara ekspres kepada plaintif secara peribadi (lihat ms 767E).

(2) Tidak ada apa-apa unsur fitnah yang didapati pada baris pertama kepada perenggan terakhir surat bertarikh 29 Januari 1999 tersebut. Plaintif gagal untuk mengemukakan sebarang autoriti yang mencadangkan bahawa perkataan-perkataan tersebut mempunyai maksud memfitnah dan juga tidak menerangkan kepada mahkamah bagaimana perkataan-perkataan tersebut boleh disifatkan sebagai memfitnah. Tambahan pula, defendan kedua dan ketiga mempunyai kewajipan undang-undang untuk

menulis surat kepada plaintif dan dengan ketiadaan niat jahat nyata, pada ex facie, surat tersebut tidak dalam apa carapun berunsur fitnah kepada plaintif. Keseluruhan perenggan terakhir jika dibaca merupakan satu rayuan kepada plaintif agar mematuhi komitmen beliau dan sebagai amaran tegas kepada plaintif untuk membuat pembayaran, jika tidak akan dikenakan tindakan litigasi (lihat ms 767F–G, I, 768C).]

Notes

For cases on defamation generally, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 193–409.

Cases referred to

Baker v Carrick [1894] 1 QB 838 (refd)
Sheffil v Van Densen [1859] 79 Mass R 304 (folld)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c) and (d)

Abdul Razak Hashim (*Razak Jay & Co*) for the plaintiff.
Vinayaga Raj Rajaratnam (*Gowri R Kangeson* with him) (*Skrine & Co*) for the defendants.

Kamalanathan Ratnam J:

The application

The defendants applied to strike out with costs the writ and statement of claim under O 18 r 19(1)(a), (b), (c) and (d) of the Rules of the High Court 1980 ('the RHC'). The learned senior assistant registrar ('the SAR') heard the application and granted an order in terms. This is the plaintiffis appeal against that order.

Facts

The plaintiff agreed to invest monies belonging to one Atsco Ltd and Koreo Uga (Atsco and Uga) of the Cayman Islands and Japan respectively. The plaintiff promised various returns for the said investment. The said Atsco and Uga then invested various sums of money. The plaintiff then entered into a settlement agreement with Atsco and Uga by a letter dated 26 December 1998 as to how he was to return the moneys invested. When the plaintiff failed to return the funds invested together with the returns, Atsco and Uga sued the present plaintiff by way of Kuala Lumpur High Court Civil Suit No D5–22–596–1999 for USD16,420,000 with interest, damages and costs. One of the terms of the settlement agreement was that the plaintiff agreed to pay a sum of USD7.5m into a bank account as directed by Uga, by 20 February 1999. Pursuant to the said term Uga, on behalf of Atsco, wrote to the plaintiff on 29 January 1999 directing the

plaintiff to pay to NEC System Integration Construction Ltd, the first defendant herein, the said sum of USD7.5m by 3.00pm of 19 February 1999.

The second and third defendants in this case are the attorneys of the first defendant. The second and third defendants then wrote to the plaintiff a letter dated 29 January 1999. For the purposes of this appeal it is necessary to reproduce the contents of the said letter:

29 January 1999

Mr Zainudin Muhammad

Payment of $7.5m and $3.8m

Dear Mr Muhammad,

We hope this letter finds you well and that you are diligent in preparation of the scheduled payments as described in the letter agreement dated 26 December 1998 between you and Mr Uga.

We are writing on behalf of NEC System Integration and Construction Ltd (the 'Company') to remind you that the first payment of $7.5m must be made under the above-mentioned agreement by the third week of February ending on 20 February 1999. Please also note that considering bank business hours, you are required to discharge your obligation by remitting the dollar amount so that it will arrive at the receiving bank Mr Uga specifies below at the latest by the close of business (ie 3.00pm, Tokyo time) on 19 February (Friday). Accordingly, we expect that you will arrange for the remittance of $7.5m a few days in advance of 19 February. Of course, you have the freedom to remit the money well in advance of the third week of February.

We would like to ask you to send by fax to Mr Uga and to the company at 81–3–5463–7760 a photocopy of a bank certificate or record evidencing that you have arranged for remittance of payment to the receiving bank when you complete the arrangement.

We expect that as a respectable businessman, your promise of 'trust me, I will pay' will be kept. Please be advised, however, that if we or the company cannot confirm the safe receipt of $7.5m at the account specified by Mr Uga by 19 February, the company will be ready to take any and all measures to collect the money from Mr Uga and you. We hope that such measures can be avoided.

Sgd	Sgd
Hirotaka Fujiwara	Satoshi Nakamura
Attorney at law	Attorney at law

The defendants had confirmed that the said letter dated 29 January 1999 was addressed to and sent only to the plaintiff. The plaintiff then sued the defendants in libel, contending that the words referred to in the said letter dated 29 January 1999 meant and were understood to mean in their natural and ordinary meaning that:

(a) the plaintiff was indebted to the defendant;

(b) the plaintiff lacked financial stability;

(c) the plaintiff completely lacked moral and financial probity.

A The plaintiff also sought to draw an innuendo in that the said words meant that he is generally a person of discreditable and immoral conduct. The plaintiff thus sued for RM350m as compensatory damages and prayed for an unspecified amount as aggravated and exemplary damages with interest and costs.

B *Findings of the court*

No publication shown

I have read the statement of claim and find as a fact that the plaintiff has only stated that the second and third defendants as servants or agents of the C first defendant wrote and published or caused to be published the said letter dated 29 January 1999. However, the plaintiff has made no reference in the statement of claim, as to who else the publication was made to, for it is trite law that in order to constitute publication, the matters must be published to, or communicated to, a third party other than to the plaintiff himself. As D was said by Bigelow J in *Sheffil v Van Densen* (1859) 79 Mass R 304 at p 305:

> It is damage done to character in the opinion of other men, and not in a party's self-estimation, which constitutes the material element in an action for libel and slander.

E Encik Abdul Razak for the plaintiff informed the court that the letter was sent by fax; but he could produce no evidence to substantiate this contention. On the contrary there was clear evidence that the said letter was dispatched by express delivery to the plaintiff personally (exh WCL-1 to encl 25). On this ground alone I ought to dismiss this appeal.

F *Is the letter defamatory of the plaintiff?*

When I asked counsel for the appellant which part of the letter he contended was defamatory of the plaintiff, counsel identified the first line of the last paragraph of the letter dated 29 January1999 which reads:

G > We expect that as a respectable businessman, your promise of 'trust me, I will pay' will be kept.

En Abdul Razak was unable to illustrate with any single authority to suggest that the said words had a defamatory meaning. He did not even address me as to how such words could be termed defamatory.

H Carter-Ruck on *Libel and Slander* (4th Ed) states at p 131 as follows:

> No action will succeed without proof of express malice in respect of a statement made by a person in the performance of a legal, moral, or social duty to a person who has a corresponding interest in receiving such statement.

I It is clear therefore that the attorneys had a legal duty to write this letter to the plaintiff and in the absence of express malice, ex facie this letter cannot in any way be defamatory of the plaintiff.

In *Baker v Carrick* [1894] 1 QB 838 (CA) a solicitor, acting on behalf of his client, gave written notice to an auctioneer not to part with the proceeds of the sale of certain goods, entrusted to him for sale, on the ground that the owner of the goods had committed an act of bankruptcy upon which an order in bankruptcy might be made against him. The owner of the goods sued the solicitor for libel. The court held that the letter was written on an occasion of privilege since the solicitor was acting in the ordinary course of his duty to his client and the occasion would have been privileged had the client himself written the letter. In considering the case before me I cannot find anything defamatory about that sentence. In fact the letter is a plea to the plaintiff to abide by his commitment. The entire final paragraph ought to be read together to understand the true intent and purpose of the said letter. Considering the sum involved it was a subtle warning to the plaintiff to pay up or else face litigation.

Obviously the plaintiff is over-sensitive. As a businessman and an investor he must realize that when entrusted with large sums of money, which he had failed to return, and as a result of which he had to enter into a settlement agreement, it is only natural that the defendants be anxious that they would get their money finally. The plaintiff must expect the rough and tumble of life and cannot run to court crying, 'libel' upon receipt of the likes of the letter dated 29 January 1999. I therefore upheld the learned SAR's decision and dismissed this appeal with costs.

SAR's decision upheld and appeal dismissed.

Reported by Joel Ng